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The Effect of the United States-Japan Treaty of Friendship, Commerce and Navigation on Japanese Investment in United States Real Estate

Gita Khadiri

THE EFFECT OF THE UNITED STATES-JAPAN TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION ON JAPANESE INVESTMENT IN UNITED STATES REAL ESTATE

Gita Khadiri*

INTRODUCTION

Recent increases in the level of foreign direct investment in United States real estate[1] prompted Congress to propose laws that limit and control the increasing tide of foreign acquisition of United States private land.[2] Despite the United States policy of encouraging foreign capital investment,[3] existing alien land laws primarily result in confu-

* J.D. Candidate, 1990. Washington College of Law, The American University.

1. *See* M. TOLCHIN & S. TOLCHIN, BUYING INTO AMERICA 153-56 (1988) (describing the attractiveness of United States real estate to foreign investors and stating that foreign investment in United States real estate between 1979 and 1983 totalled approximately 50 billion dollars); Lambert & Howard, *U.S. Real Estate: The Japanese Factor*, 1 PROB. & PROP. 28, 30 (1987) (stating that Japanese investment in United States real estate totalled approximately seven to eight billion dollars by the end of 1986, making Japan the third largest foreign investor in United States real estate); Sears, *Japanese Real Estate Investment in the United States*, URBAN LAND, Feb. 1987, at 6, 8-10 (citing recent cases of Japanese real estate investment in the United States); *Foreign Investment Rising in D.C. Area*, Wash. Post, Nov. 19, 1988, at F1 (reporting that foreign investors, mostly Canadians, Western Europeans, and Japanese, now own 23 percent of the 61 million square feet of office space in Washington, D.C.). Foreign investors have more than doubled their holdings in the United States since 1982 and presently account for 5.8 percent of the non-farm nonresidential property in the United States according to a recent report by the National Association of Realtors and Massachusetts Institute of Technology (MIT). *Id.*

2. *See* S. 1697, 100th Cong., 2d Sess. (1987) (providing for the registration of foreign interests in United States property); H.R. 312, 100th Cong., 2d Sess. (1987); H.R. 3, 100th Cong., 1st Sess. § 703 (1987) (requiring foreign persons to register basic information regarding their United States operations when they gain significant interest or controlling interest in certain United States assets or properties); *see also*, 134 CONG. REC. H2754 (daily ed. Apr. 29, 1988) (statement of Rep. Bentley) (examining the wave of Japanese purchases in the United States); 134 CONG. REC. H2627 (daily ed. April 27, 1988) (statement of Rep. Gaydos) (discussing the need for foreign investment disclosure); 134 CONG. REC. H3916 (daily ed. June 2, 1988) (statement of Rep. Bentley) (criticizing Japanese real estate acquisitions of urban real property in the United States). *But see* Katz, *Foreign Direct Investment in the United States-Advantages and Barriers*, 11 CASE W. RES. J. INT'L L. 473, 476-78 (1979) (stating that foreign investment in the United States creates jobs, produces a demand for domestic goods, introduces new technology and new capital, and increases competition).

3. *See* 22 U.S.C. § 3101(c) (1982 & Supp. V 1987) (stating that the International Investment Survey Act of 1976, enacted to provide Congress with information on international investment to facilitate policy-making, does not intend to "restrain or deter"

sion,[4] and even disincentive[5] for foreign investors. The promulgation of most of these outdated and inconsistent state laws, however, was the result of local xenophobic reactions[6] to foreign investment. These state laws lacked constitutionally valid reasons.[7]

In the past, scholars have suggested four possible solutions to overcome the problems arising from these nonuniform and outdated state land laws. First, the Supreme Court could invalidate these state laws on constitutional grounds,[8] such as due process,[9] equal protection,[10] and preemption.[11] Second, the federal government could encourage state

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foreign investment in the United States); *infra* note 75 and accompanying text (describing the International Investment Survey Act of 1976).

4. *See* Sullivan, *Alien Land Laws: A Re-Evaluation*, 36 TEMP. L.Q. 15, 34 (1962) (finding that the wide array of confusing state laws resulted from hasty responses to foreign purchases of land at a time when no uniform system of land allocation existed); *see also* Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 663 (1976) (concluding that current legislation affecting alien land ownership is so obscure that it creates a confusing picture regarding enforcement at both state and local levels). Legislation specifically addressing foreign investment is also sparse. *Id.*

5. *See* Yadvish, *A Proposed Model Code Concerning Alien Acquisition and Ownership of Real Property in the United States*, 3 INT'L PROP. INV. J. 89, 93 (1986) (suggesting that current alien land laws may dissuade potential foreign investment due to their complexity). One result of this confusion is the potential loss of overall investment in the United States because current laws were enacted in a piecemeal manner, leaving foreign investors with very little guidance. *Id.*

6. *See* Note, *Foreign Direct Investment in United States Real Estate: Xenophobic or Principled Reaction?*, 28 U. FLA. L. REV. 491, 500 (1976) [hereinafter Note, *Xenophobic or Principled Reaction?*] (stating that cyclical and topical changes of American anti-alien sentiment to foreign investment resulted in anti-alien laws). Despite constitutional challenges, many of these laws have survived at the state level. *Id.*; *see also infra* notes 16-21 (discussing the evolution of anti-Oriental sentiment into anti-alien statutes early in the twentieth century).

7. *See* Graham v. Richardson, 403 U.S. 365, 371 (1971) (holding that resident aliens are entitled to equal protection of the state where they reside under the strict scrutiny standard, thus, finding the discriminatory state law unconstitutional). *But see* Lehndorff Geneva, Inc. v. Warren, 74 Wis. 2d 369, 378, 246 N.W.2d 815, 825 (1976) (denying the extension of equal protection under the strict scrutiny standard to nonresident aliens, and finding the restrictive Wisconsin state law constitutional); Morrison, *supra* note 4, at 644 (1976) (finding that the equal protection clause appears to prohibit states from restricting land purchases as to resident aliens but not to nonresident aliens).

8. *See infra* note 22 and accompanying text (citing cases where the Supreme Court has invalidated alien land laws based upon due process and equal protection considerations).

9. *See infra* notes 80-87 and accompanying text (discussing the effect of the due process clause of the fourteenth amendment on state laws).

10. *See infra* notes 88-98 and accompanying text (defining the role of the equal protection clause of the fourteenth amendment on legislation restricting foreign investment in United States real estate).

11. *See infra* notes 99-106 and accompanying text (discussing the standard of review under the preemption doctrine and the potential of federal regulation of United States land preempting conflicting state laws).

governments to repeal these laws.[12] Third, the federal government could create a Model Uniform Act that would govern the area of foreign investment in real property.[13] Fourth, the federal government could strengthen existing bilateral treaties of Friendship, Commerce and Navigation (FCN)[14] to invalidate state law restrictions and to promote the pro-investment policy of the United States.

This Comment explores the possibility of implementing the first and fourth solutions by recommending revision of the existing bilateral FCN treaty between the United States and Japan (United States-Japan FCN Treaty).[15] Such revision should address Japanese acquisition and ownership of United States real estate and act as a future model for FCN treaties. Part I provides an overview of American concerns of the feared omnipresence of Japanese real estate investors in the United States. Part II surveys existing laws regulating the foreign acquisition of United States real estate and comments on their effectiveness. Part III examines the power of federal regulation over foreign investment in real estate in the United States. Part IV analyzes the ineffectiveness of existing FCN treaties, such as the United States-Japan FCN Treaty, regarding the acquisition and ownership of real property. Finally, Part V discusses two recommendations for the revision of the relevant provisions of the existing United States-Japan FCN Treaty.

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12. *See* Yadvish, *supra* note 5, at 95 (proposing that encouraging states to abolish restrictive anti-alien statutes is a possible alternative in the absence of a proposed code concerning alien acquisition and ownership of real property in the United States).

13. *Id.* (proposing a Federal Model Uniform Act governing the foreign acquisition and ownership of real property).

14. *See* Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 230 (1956) (stating that the aim of Friendship, Commerce and Navigation treaties is to establish a governmental policy of hospitality and equality toward the foreign investor); *cf.* Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origins, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. LAW. 105, 108-09 (1986) (explaining the advantages that recent bilateral investment treaties (BIT) have over the United States FCN treaty program). The United States implemented a model BIT with Third World countries in an effort to protect United States foreign investment abroad. *Id.* The United States addressed only essential investment-related subjects, such as financial transfers, expropriation, and treatment standards in order to refine the FCN treaties. *Id.* In the past, skepticism among Third World countries about the benefits of unrestrained domestic investment and protectionist policies impeded the United States FCN treaty program. *Id.*

15. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter United States-Japan FCN Treaty].

I. THE JAPANESE PRESENCE IN THE UNITED STATES REAL ESTATE MARKET

A. HISTORICAL BACKGROUND

State laws have historically restricted ownership of property located within the United States by aliens, especially those of Oriental descent.[16] For example, the immigration of Japanese to the Pacific Coast in the early twentieth century prompted the California legislature to pass laws prohibiting ownership of California lands by aliens who were ineligible for United States citizenship.[17] In *Terrace v. Thompson*,[18] the United States Supreme Court declared this California state statute constitutional. A subsequent Supreme Court decision,[19] *Porterfield v. Webb*, prompted other states to enact similar legislation.[20] The need for state legislation prohibiting Japanese purchase of real estate subsided by 1930 because of the exclusion of Japanese in the Immigration Act of 1924.[21] World War II marked an increase in discriminatory land ownership statutes at the state level; most of these statutes were either repealed or invalidated by 1952.[22]

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16. *See* Morrison, *supra* note 4, at 627 (discussing the discrimination against persons of Oriental ancestry). Most laws addressing people of Oriental descent were highly restrictive and intended to limit Oriental direct ownership of United States property. *Id.*

17. *See* 1913 CAL. STAT. 113 (requiring United States citizenship as a precondition for owning California land). California tightened its restrictions on alien land ownership in 1920 when its voters approved a severe initiative law. 1921 CAL. STAT. lxxxvii. This law became the model for anti-Japanese legislation throughout the West Coast. Sullivan, *supra* note 4, at 33.

18. Terrace v. Thompson, 263 U.S. 197, 219-22 (1923) (stating that the anti-alien laws did not violate the equal protection clause).

19. Porterfield v. Webb, 263 U.S. 225, 228 (1923) (holding that the racially restrictive California statute is constitutional as long as the stated rationale of the law is reasonable). The court further explained that because the discrimination was based upon a reasonable classification, no violation of the due process or equal protection clauses of the fourteenth amendment had occurred. *Id.* at 233.

20. *See* Sullivan, *supra* note 4, at 34 (finding that following the 1923 Supreme Court decisions, Arizona, Delaware, Idaho, Kansas, Montana, Oregon, and Texas adopted similar restrictive land statutes); *see also* Terrace v. Thompson, 263 U.S. 197, 220-21 (1923) (affirming the constitutionality of a Washington statute that prohibited the ownership of land by aliens who had not declared their intention to become United States citizens).

21. Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153, 159-60 (repealed 1952)(containing a provision, aimed primarily at the Japanese, that prohibited aliens ineligible for citizenship to be admitted to the United States as immigrants).

22. *See* Oyama v. California, 332 U.S. 633, 647 (1948) (striking down racially restrictive California statutes because United States-born citizens of Oriental descent had a right to own land anywhere in the United States); Kenji Namba v. McCourt, 185 Or. 579, 581, 204 P.2d 569, 571 (1949) (invalidating a restrictive alien land law in Oregon that prohibited all persons ineligible for citizenship from owning or leasing land); *see also* Fujii v. State, 38 Cal. 2d 718, 737, 242 P.2d 617, 630 (1952) (holding

B. General Reasons for the Increased Tide of Japanese Investment in United States Real Estate

Japanese choose to invest in United States real estate because of political and economic[23] stability and constitutional guarantees against confiscation of private property.[24] In addition, Japanese investors rely on a series of economic factors: first, the high appreciation rate in real estate values as compared to the inflation rate;[25] second, the relatively large size of the United States market;[26] third, the sophisticated United States capital market that grants financing at relatively low interest rates;[27] and fourth, state offered investment incentives designed to attract Japanese industry. A significant incentive for investment is the relatively low price of real estate in terms of foreign currency in periods where the dollar declines in value.[28] For example, the Japanese yen has greatly appreciated in value relative to the United States dollar.[29]

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that the California alien land law violated the equal protection clause of the fourteenth amendment). The court stated that the purpose of the California alien land law was clearly discriminatory in nature. *Id.* at 737-38.

23. *See*, Yadvish, *supra* note 5, at 90-95 (listing favorable economic factors that encourage foreign investment in the United States real estate market). Foreign investors also rely upon the United States economic history of maintaining a higher quality and absolute level of growth over time as well as the size and diversity of the United States economy. *Id.* at 90.

24. *See* Yadvish, *supra* note 5, at 90 (stating that the stability of the United States government attracts foreign investment).

25. *See id.* (stating that an effectively controlled inflation rate minimizes the risk of an economic reversal in the United States).

26. Note, *Foreign Investment in United States Real Estate: Federal and State Regulation*, 12 CASE W. RES. J. INT'L L. 231, 233 (1980) [hereinafter Note, *Federal and State Regulation*] (citing the size of the United States real estate markets as one of eight factors that affects foreign investment in United States real estate); Roulac, *Advising Foreign Investors in U.S. Real Estate*, 9 REAL EST. L.J., 108, 111 (1980) (stating that relative to many other countries, the United States has a greater supply of land at comparatively lower prices).

27. Note, *Federal and State Regulation*, *supra* note 26, at 233 (finding United States capital markets a factor in influencing the desirability of United States real estate); Roulac, *supra* note 26, at 112 (explaining that foreign investors rely upon well-established services to manage and finance their real estate holdings in the United States). Furthermore, the availability of nonrecourse financing provides foreign investors with even more leverage. *Id.* Nonrecourse financing bars United States lending institutions from suing Japanese borrowers if the security value of their loans falls below the amount required to repay the loan. *Id.*

28. Katz, *supra* note 2, at 476. This movement in the exchange rate makes exports to the United States more expensive and encourages foreign investment to prevent the loss of the United States export market. *Id.*

29. Sears, *supra* note 1, at 7; *see also* Lambert, *supra* note 1, at 30 (listing the strength of the yen as one of the factors behind Japanese investment in United States real estate); *Japanese Foreign Direct Investment: Moving to the Markets*, ECONOMIST, Feb. 20, 1988, at 75 (stating that Japanese investments in the United States are the result of the strong yen and the general trend toward globalization); Mathews, *Record Japanese Speculation in Real Estate Inflates Values, Threatens Political Backlash*,

Several additional factors have contributed to the recent trend of increased Japanese real estate investment in the United States. First, Japan is currently experiencing a significant capital surplus.[30] Second, Japan lacks an active internal real estate market.[31] Third, the Japanese view ownership of United States real estate as prestigious.[32] Finally, real estate investments provide tax benefits and an opportunity for capital appreciation.[33]

C. RECENT REACTIONS TO JAPANESE PRESENCE IN UNITED STATES REAL ESTATE

Recent Japanese investment in United States real estate has rekindled the earlier fear of Japan gaining a competitive edge over the United States.[34] Since the mid-1970s, the Japanese have invested heavily in office building and hotel properties markets.[35] Japanese nationals

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Wash. Post, May 29, 1988, at H1 (reporting that the appreciation of the yen and other currencies has prompted an unprecedented buying spree in exclusive neighborhoods of Los Angeles, San Francisco, and Hawaii); Rowen, *Japan Has Yen for U.S. Property*, Wash. Post, Jan. 25, 1987, at K1 (finding that sixty percent appreciation of the yen in two years has led Japanese investors to buy United States assets at basically a sixty percent discount).

30. *See* Lambert, *supra* note 1, at 30 (explaining that Japanese capital surplus is invested in the United States because a large portion of it cannot be invested in Japan).

31. *See* Sears, *supra* note 1, at 7-8 (describing real estate investment practices in Japan as based on a "buy and hold" philosophy because the sale of property often signifies financial ruin); *Japanese Property: The Party's Over*, ECONOMIST, July 16, 1988, at 75 (discussing the high price of land in Tokyo and the slump in the Japanese real estate market); *see also Cost of Living in Tokyo Takes Toll on Embassies*, Balt. Sun, May 30, 1988, at 4, (reporting that the high cost of maintaining an embassy in Tokyo has forced Uganda to close its embassy in Tokyo and to handle diplomatic relations with Japan through its embassy in Peking, China). Australia, however, has dealt with high costs in Tokyo by selling 1.5 acres of its 4.4 acre embassy in central Tokyo in exchange for 500 million dollars in cash, a new embassy building, and a new housing complex for 35 Australian diplomatic families. *Id.*

32. *See* Lambert, *supra* note 1, at 30 (explaining that the prestige factor, most often associated with well known buildings or landmarks, contributes to the aggressive pricing of Japanese investors). Recent well publicized Japanese purchases include Shuwa Corporation's acquisition of ABC Headquarters in New York for $175 million dollars and Kumagai Gumi's acquisition of Zeckendorf Properties for $1.2 billion dollars. *Id.* at 31.

33. Lambert, *supra* note 1, at 30.

34. *See supra* note 2 and accompanying text (discussing recent Congressional proposals reflecting the American desire to regain its competitive edge in industry against countries like Japan); KENNETH LEVENTHAL & CO., JAPANESE INVESTMENT IN UNITED STATES REAL ESTATE (1988) [hereinafter LEVENTHAL] (stating that seventy-eight percent of Americans favored imposing restrictions on foreign investment in United States real estate).

35. *See, e.g.*, M. TOLCHIN & S. TOLCHIN, *supra* note 1, at 161 (citing Shuwa Investment Company's acquisition of the ARCO Plaza in Los Angeles for $620 million); Sears, *supra* note 1, at 9 (displaying a chart of Japanese purchases of hotels and office buildings in the United States by large Japanese corporations during 1985 and

invested approximately seven to eight billion dollars by the end of 1986,[36] making them the third largest foreign investor in United States real estate. A 1987 survey reported a record 12.7 billion dollars in the Japanese purchase of United States real estate.[37]

This recent Japanese investment boom in United States real estate has prompted some states, such as Hawaii, to propose legislation that would limit the extent of foreign investment in United States real estate.[38] As a result of Japanese investment, tax assessments on Hawaiian property doubled.[39] In response to residents' complaints about the tax increases, the Mayor of Honolulu proposed legislation barring nonresident aliens from purchasing residential, reservation, or agricultural property.[40]

Japanese real estate investment, however, funnels money into local economies.[41] The National Association of Realtors, in conjunction with the Center for Real Estate Development of the Massachusetts Institute of Technology, issued a report in 1988 on foreign investment in United States real estate.[42] The report states that foreign real estate purchases allow American property owners to convert equity real estate investments into cash.[43] This cash subsequently finances other acquisitions

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1986); Lambert, *supra* note 1, at 31 (listing recently acquired properties by Japanese investors, such as the Hyatt Regency Hotel in Waikiki for $245 million).

36. *See* Lambert, *supra* note 1, at 30 (explaining that although the appreciation of the yen accounts for some of the increase in Japanese investment in United States real estate, the 1986 figure also reflects the new policy of the Japanese Ministry of Finance to encourage institutional investors to increase their holdings of foreign investments).

37. LEVENTHAL, *supra* note 34.

38. *See* Mathews, *Record Japanese Speculation in Real Estate Inflates Values, Threatens Political Backlash*, Wash. Post, May 29, 1988, at H1 (discussing the political turmoil in Hawaii regarding proposed limitations on foreign investment in real estate).

39. *Id.*

40. *Id.* The legislation restricts the sale of noncommercial property to any alien who neither intends to become a citizen nor lives for at least 185 days per year in a home purchased in Honolulu. *Id.* Japanese real estate speculation caused some wealthy neighborhoods to experience as much as sixty percent inflation in property values. *Id.* Mayor Fasi intends this legislation to limit Japanese speculation. *Id.*

41. *See id.* (quoting a statement made by the Honorable Daniel J. Kihano, Speaker of the State House of Representatives, who acknowledged some problems with Japanese investors but emphasized the fact that the Japanese "made a lot of investments that saved a lot of Hawaiian businesses from going under").

42. NATIONAL ASSOCIATION OF REALTORS & MIT CENTER FOR REAL ESTATE DEVELOPMENT, FOREIGN INVESTMENT IN UNITED STATES REAL ESTATE (1988) [hereinafter NATIONAL ASS'N OF REALTORS REPORT]; *see* Bredemeier, *Foreign Investment Rising in D.C. Area*, Wash. Post, Nov. 19, 1988, at F1 (discussing the National Association of Realtors and MIT report on international investment in United States real estate).

43. *See* NATIONAL ASS'N OF REALTORS REPORT, *supra* note 42, at 27-28.

and development, thus increasing United States capital stock.[44] The report concluded that foreign investment in United States real estate helps balance the trade and budget deficits and provides capital without the need to increase personal savings or to decrease consumption.[45] State government officals, cognizant of the benefits of stable local economies, have designed incentive systems to lure foreign investment, especially the Japanese, to their states.[46] By utilizing these incentive systems, state governments are thereby able to satiate and finance their growing appetites for capital.[47]

II. EXISTING LAWS LIMITING THE FOREIGN ACQUISITION OF UNITED STATES LAND

A. STATE LAW REGULATION AND RELATED PROBLEMS

1. Historical Background of Foreign Land Ownership Statutes

The Supreme Court has long held that states may legitimately regulate foreign ownership of property.[48] State laws restrict the property rights of aliens to allay American security concerns regarding foreign ownership of land.[49] An amalgamation of benchmark surveys[50] reveals

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44. *Id.*
45. *Id.*
46. *See* M. TOLCHIN & S. TOLCHIN, *supra* note 1, at 49-67 (discussing state incentive systems that attract foreign investment with the ultimate aim of promoting local economic development). For example, the Indiana legislature repealed its unitary tax to attract Japanese companies. *Id.* at 50. Upon repeal, Sony announced its intention to build a video-disc plant in Indiana. *Id.* The plant would employ 300 American workers. *Id.* Indiana law reduces foreign investment tax on construction and infrastructure. *Id.* at 51. The state also funds community loans to foreign investors. *Id.* When the debt is repaid, the community invests the money into further economic development. *Id.* Many state legislatures, realizing that they must spend money to attract investment, follow the Indiana model. *Id.* at 52.
47. *Id.*
48. *See* Hauenstein v. Lynham, 100 U.S. 483, 484 (1879) (holding that state governments regulate foreign ownership of property subject to United States treaties); *see also* Morrison, *supra* note 4, at 629 (stating that land law is principally state law). States circumscribed real estate ownership rights through the common law and through statutory innovations. *Id.*
49. *See* Forst, *Regulation of Foreign Investment in United States Real Estate: State of Federal Prerogative?*, 1981 S. ILL. U.L.J. 21, 28-29 (justifying state regulation of foreign ownership of property); *see also* Mathews, *supra* note 38, at H1 (stating that Los Angeles City Council-member Nate Holden filed a motion that would bar foreign investors from purchasing property in Los Angeles if their nations restrict American investment in property). Holden believes that unless the growing foreign acquisitions of property is checked, American citizens will lose control of their lives and communities, thus posing a threat to national security. *Id.*
50. *Compare* Note, *State Laws Restricting Land Purchases by Aliens: Some Constitutional and Policy Considerations*, 21 COLUM. J. TRANSNAT'L L. 135, 136-38 (1982) [hereinafter Note, *State Laws Restricting Land Purchases*] (dividing the his-

four phases of American political reaction to alien land ownership: first, the American Revolution;[51] second, the pro-foreign investment policies of the early and mid-1800s;[52] third, the anti-Japanese movements during the early 1900s and World War II;[53] and, fourth, the anti-alien response to OPEC nations' land acquisitions of the late 1970s.[54]

2. *The Ineffectiveness of State Laws*

Although states still attempt to regulate foreign investment in United States real estate, loopholes in many state laws allow foreign investors to circumvent land ownership restrictions.[55] Most state laws

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tory of alien land law into four phases: (1) state law following the American Revolution; (2) the liberalization of alien land ownership rights after the Civil War; (3) anti-alien legislation in western states beginning in the 1880s; and (4) pre-World War I restrictive legislation that California initiated limiting Japanese landholding); *with* Forst, *supra* note 53, at 24-26 (describing the four phases as: (1) the American Revolution; (2) early frontier development; (3) anti-Japanese legislation during World War II; and (4) the reaction to OPEC's property acquisitions in the late 1970s); *and* Sullivan, *supra* note 4, at 26 (describing the four phases as: (1) the reception of the English common law during the colonial and revolutionary periods; (2) the statutory modifications of the common law in the early and mid-1800s; (3) the anti-alien legislation in farm states at the end of the 1800s; and (4) anti-Japanese legislation during the 1920s and World War II).

51. Forst, *supra* note 49, at 25. While still under British control, the colonies adopted English common law. *Id.* at 26. This law prohibited foreign acquisition of good title to land, unless the foreign citizen became naturalized. *Id.* After the Revolution, most former colonies obviated the common law, but it remained relevant in some states. *Id.*

52. *See* Note, *State Laws Restricting Land Purchases*, *supra* note 50, at 137 (stating that the Western states' removal and revision of common law restrictions reflected pro-frontier development policies). As a result, by 1880, aliens held the right to own land in half of the states. *Id.*

53. Forst, *supra* note 49, at 26; *supra* notes 16-22 and accompanying text (discussing the rise and fall of anti-alien state laws directed at curbing Japanese investment in United States land).

54. *Id.* (stating Iowa, Nebraska, and Wisconsin are three states that restricted the situs and amount of farm land that foreign investors could purchase during the 1970s); *see also* Note, *Xenophobic or Principled Reaction?*, *supra* note 6, at 493-94 (describing reasons for heightened United States concern over the sudden rise in Japanese and Arab foreign direct investment during the 1970s). OPEC countries invested their large capital surpluses in real estate because the United States offered political and economic stability, relatively low land prices, and attractive tax advantages. *Id.* at 494; *see also* Meyer, *Kuwaities' Resort Project Off Coast of Carolina Proceeds Amid Rumors, Stiff Opposition*, Wall St. J., Feb. 26, 1975, at 38 (noting environmentalist protests against the building of a seaside resort near one of the last nesting grounds of the nearly extinct loggerhead turtle). The turtles nest on eleven miles of unspoiled Kiawah Island beach in South Carolina. *Id.* Indigent residents of nearby Johns Island also protested against the Kuwaitie's building of a resort on Kiawah because the proximity of the resort raised the property value on Johns Island, creating the potential for higher property taxes. *Id.*

55. *See* Yadvish, *supra* note 5, at 99-101 (discussing the ineffectiveness of anti-alien land statutes in face of foreign investors' utilization of corporate forms or trusts to

apply to persons rather than to corporations.[56] Foreign investors can thus purchase real estate utilizing a corporate form. An astute foreign investor may also buy land through trusts[57] and inheritance statutes, further bypassing alien land ownership restrictions.[58] Most state laws contradict the proforeign investment policy of the United States.[59] Although twenty-two states have established offices in Tokyo to attract Japanese industry and investment,[60] the complex and contradictory nature of state laws potentially dissuades foreign investment in other states that have restrictive alien land ownership laws.[61]

B. THE VARYING RESTRICTIONS IN STATE STATUTES

A brief examination of the complexity of existing state laws delineates potential disincentives for foreign investors. Although eight states are nonrestrictive in their approach to alien land ownership,[62] at least five states severely restrict alien acquisition and ownership of real es-

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directly own United States land).

56. *See* Morrison, *supra* note 4, at 634 (stating that foreign investors use the corporate form to avoid state laws that prohibit individuals from owning real property).

57. *See* Note, *Our Land is Your Land: Ineffective State Restriction of Alien Land Ownership and the Need for Federal Legislation*, 13 J. MARSHALL. L. REV. 679, 695 (1980) (stating that where a state law permits the formation of a real estate trust, the foreign investor can retain the beneficial control of the trust while an American trustee holds legal title to the trust); Yadvish, *supra* note 5, at 100 (finding that the lack of specific statutory or case law guidance in most states allows foreign investors to hold land in compliance with trust laws, thus, avoiding direct land ownership restrictions).

58. *See* Yadvish, *supra* note 5, at 101 (explaining that nonresident aliens may leave their property to a United States citizen in trust for a foreign relative).

59. *See supra* notes 3-5 and accompanying text (discussing the potential conflict between the United States pro-foreign investment policy and restrictive state alien land ownership laws).

60. See M. TOLCHIN & S. TOLCHIN, *supra* note 1, at 53 (noting that states set up offices abroad to lure foreign investment and trade). Generally, the number of factories that foreign investors build, the number of people they employ, the dollars they invest, and the number of farms they run, measure the benefit of foreign investment. *Id.* at 55. For example, in 1968, Virginia accommodated only 24 foreign firms. *Id.* As of 1988, Virginia had overseas offices in Brussels and Tokyo and 289 foreign firms that employ 25,000 people with a total investment of one billion dollars. *Id.* State representatives living abroad present their state incentive systems to foreign investors. *Id.* at 58. The incentive systems reduce state and local taxes, exempt new businesses from property tax, and provide state issued Industrial Development Bonds that finance industrial projects at low interest rates. *Id.* at 59.

61. *See* Yadvish, *supra* note 5, at 91-93 (explaining why state alien land laws could dissuade foreign investment in United States real estate); *see also* Azevedo, *Foreign Direct Investment in United States Real Estate: A Survey of Federal and State Entry Level Regulation*, 7 N.C.J. INT'L L. & COM. REG., 1, 27-47 (1982) (surveying state and federal laws as they determine an alien investor's property rights).

62. *See* Azevedo, *supra* note 61, at 35 (stating that Arizona, Colorado, Florida, Louisiana, Massachusetts, Montana, New Hampshire, and Vermont neither restrict nor guarantee alien ownership of land).

tate.[63] Mississippi's alien land statute, for example, expressly forbids nonresident alien ownership of property.[64] The same law, however, makes an exception for Syrian and Lebanese citizens and allows them to inherit property from Mississippi residents.[65]

Other states restrict the time period during which an alien may hold United States property,[66] the amount of land purchased,[67] or the ownership of agricultural land.[68] The Illinois alien land statute, for example, restricts alien land transactions and requires all aliens who acquire, hold, or inherit land to dispose of such lands within six years (or within six years of the alien reaching the age of twenty-one) unless the alien obtains United States citizenship.[69] Pennsylvania, in comparison, restricts acreage ownership, authorizing aliens to own up to 5000 acres of real estate.[70] Finally, most Midwestern states, such as Iowa,[71] prohibit alien ownership of agricultural land.

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63. *See* Yadvish, *supra* note 5, at 96 (stating that regardless of the amount or type or duration of ownership, Connecticut, Mississippi, Nebraska, Oklahoma, and Wyoming severely restrict foreign investment in real property); Comment, *Foreign Investment in Mississippi: An Argument for Leniency*, 51 MISS. L.J. 819, 842-45 (1981) [hereinafter Comment, *Foreign Investment in Mississippi*] (describing the restrictive land law of Mississippi in detail). Mississippi bases its ownership limitations on the residential status of the foreign investor. *Id.* at 843. Nonresident aliens, however, may purchase land at foreclosure sales or take liens to secure debts. *Id.* The nonresident alien may then hold the lien for up to 20 years. *Id.*

64. MISS. CODE ANN. § 89-1-23 (1974 & Supp. 1988) (stating nonresident aliens may not acquire or hold land except through the enforcement of a lien, in which case it can be held for up to 20 years).

65. *Id.*

66. *See* ILL. ANN. STAT. ch. 6, para. 2 (Smith-Hurd 1975 & Supp. 1989) (limiting an alien's right to hold land up to six years after the alien turns 21-years-old); KY. REV. STAT. ANN. § 381.300 (Michie/Bobbs-Merrill 1972 & Supp. 1988) (limiting the right of aliens to own land to eight years or the land escheats to the state); *see also* Yadvish, *supra* note 5, at 96 (citing Illinois and Kentucky as two states that impose time restrictions on alien ownership of land).

67. *See* S.C. CODE ANN. § 27-13-30 (Law. Co-op 1976 & Supp. 1988) (restricting the rights of aliens to hold land to parcels of less than 5000 acres); WIS. STAT. ANN. § 710.02 (West 1981 & Supp. 1988-89) (limiting the amount of land that an alien may acquire to 640 acres, except if the acquisition is for the repayment of a debt incurred in good faith).

68. *See* PA. STAT. ANN. tit. 68, § 41 (Purdon 1965 & Supp. 1988) (limiting the amount of agricultural land that an alien may own up to 100 acres, except if the land is inherited or devised or held in payment for indebtedness).

69. ILL. ANN. STAT. ch. 6, § 2 (Smith-Hurd 1975 & Supp. 1988).

70. PA. STAT. ANN. tit. 68, § 28 (Purdon 1965 & Supp. 1988).

71. IOWA CODE ANN. § 567.3 (West 1950 & Supp. 1988). Exceptions to this rule are possible if the agricultural land is acquired through devise or descent or in the collection of debts, is encumbered for security purposes, is acquired for research and development, or for some nonfarming purpose. *Id.*

C. FEDERAL REGULATION

In addition to state government regulation, the federal government has also implemented laws that limit foreign investors. Generally, existing federal laws address: first, alien access to public lands and resources;[72] second, hostile alien or enemy-ownership of real property;[73] third, alien ownership of land located in United States territories or the District of Columbia;[74] and, fourth, statistical compilation of foreign investment in United States real estate through alien investment disclosure requirements.[75]

Nevertheless, federal laws advocate a pro-foreign investment policy because state land laws heavily restrict foreign investment in privately owned real estate.[76] The Mineral Lands Leasing Act of 1920,[77] for example, applies to the regulation of mineral leases on federal lands. The

72. *See* Mining Act of 1872, ch. 152, 17 Stat. 91 (1872)) (codified as amended at 30 U.S.C. § 22 (1982 & Supp. V 1987)) (stating that only United States citizens or those who have declared an intent to become United States citizens may purchase mining claims). The law further permits these qualified parties to explore and purchase valuable mineral deposits in United States land. *Id.* Parties can also be corporations organized under state laws of the United States. *Id.* at § 24; *see also* Mineral Lands Leasing Act of 1920, ch. 85, Pub. L. No. 141, 41 Stat. 437 (1920) (codified as amended at 30 U.S.C. § 181 (1982 & Supp. V 1987)) (stating that alien investors may control United States corporate lessees if their country grants the United States citizens or corporations reciprocal benefits). The act governs mineral leases on federal lands for coal, phosphate, sodium, potassium, oil, oil shale, and gilsonate. *Id.* Citizens of countries that deny United States persons reciprocal privileges, however, do not qualify. *Id.*

73. *See, e.g.*, Trading with the Enemy Act, ch. 106, Pub. L. No. 177, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. § 6 (1982 & Supp. V 1987)) (granting the United States government the power to seize the property of enemy aliens); Foreign Assets Control Regulations, 31 C.F.R. § 500.201 (1987) (forbidding aliens of designated countries from transacting any business related to property unless the Secretary of Treasury grants a special license); *see also* Note, *State Laws Restricting Land Purchases*, *supra* note 50, at 140 (observing that the existence of federal regulations undermines state allegations that alien land laws are required for national security).

74. Alien Land Act of 1887, ch. 340, 24 Stat. 476 (codified as amended at 48 U.S.C. § 1501-03 (1982 & Supp. 1987)) (restricting land ownership in United States territories to United States citizens and to aliens who clearly intend to become United States citizens).

75. *See* Agricultural Foreign Investment Disclosure Act, Pub. L. No. 95-460, 92 Stat. 1263 (1978) (codified as amended at 7 U.S.C. § 3501 (1982 & Supp. V 1987)) (requiring foreigners who acquire, transfer, or hold interests in agricultural land, to report the holding or transaction to the Secretary of Agriculture); Foreign Investment Study Act of 1974, Pub. L. No. 93-479, 88 Stat. 1450 (1974) (authorizing the Secretary of Commerce to conduct a two year survey of direct foreign and portfolio investments in the United States); International Investment and Trade in Services Act, Pub. L. No. 94-472, 90 Stat. 2059 (1976) (codified at 22 U.S.C. §§ 3101-08 (1982 & Supp. V 1987)) (empowering the President to collect, date, and promulgate a benchmark survey every five years of foreign investment in the United States and abroad).

76. Forst, *supra* note 49, at 33.

77. Mineral Lands Leasing Act of 1920, 30 U.S.C. § 181 (1982 & Supp. V 1987).

Act allows alien investors to own interests in United States corporate leases where reciprocity provisions are in effect.[78] Other statutes expressly state a pro-foreign investment stance. For example, the International Survey Act of 1976[79] aims to collect statistical information and to encourage foreign investment.

III. THE SUPREMACY OF FEDERAL REGULATION IN THE AREA OF FOREIGN INVESTMENT IN UNITED STATES REALTY

A. DUE PROCESS CONSIDERATIONS

The Supreme Court characterizes laws governing foreign investment in real property as economic regulations, therefore, offering limited protection to a foreign investor through the due process clause of the fourteenth amendment.[80] To satisfy the due process requirement, a state must merely show that the state law in question bears a rational relationship to a legitimate state interest.[81] This standard of review is comparable to the one applied to nonsuspect classifications under the equal protection clause which proscribes only arbitrary and capricious laws.[82]

In addition, the due process clause, can provide compensation for a taking of property for public use because the due process clause incorporates the fifth amendment's taking clause.[83] The effect of this incorporation on the nonresident alien, however, leaves the foreign investor

78. *Id.*

79. *See supra* note 75 and accompanying text (discussing the details of the International Survey Act of 1976).

80. *See* United States v. Carolene Products, Co., 304 U.S. 144, 147 (1938) (applying a minimal rationality test to reject a due process challenge to a federal law prohibiting the interstate shipment of "filled" milk); *see also* Nebbia v. New York, 291 U.S. 502, 537 (1938) (holding that a state may choose an economic policy with the reasonable purpose of promoting public welfare, thus, satisfying due process test of minimal rationality).

81. *See* Terrace v. Thompson, 263 U.S. 197, 220-22 (1923) (finding that a state may bar nonresident ownership of its lands without violating the due process clause of the fourteenth amendment because the classification bears a reasonable relation to a legitimate legislative end); Shames v. Nebraska, 323 F. Supp. 1321, 1334 (D. Neb. 1971) (following the decision of *Terrace v. Thompson* and noting that the Supreme Court allowed a state to bar nonresident aliens from land ownership because it was within the valid exercise of the police power of the state; thus, the regulation was not violative of the due process clause of the fourteenth amendment).

82. Fisch, *State Regulation of Alien Land Ownership*, 43 MO. L. REV. 407, 419-20 (1978); Morrison, *supra* note 4, at 645 (finding that both the equal protection clause and the due process clause confront the legitimacy of the purpose of a classification).

83. *See* Chicago, Burlington, & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897) (holding that the due process clause of the fourteenth amendment requires the payment of just compensation to owners of property appropriated for public use).

in a vague area of the law.[84] Under the "territorial" view, due process protections apply to nonresident aliens if they appear within the territory where the property is located.[85] The "vested" due process view, however, provides nonresident aliens due process rights regardless of the presence of the alien in the state.[86] Ultimately, a due process claim has a greater chance for success in states providing a time period for an alien investor to dispose of real estate holdings or in ones which provides the alien investor with compensation.[87]

B. EQUAL PROTECTION CHALLENGES

The equal protection clause of the fourteenth amendment provides resident alien investors with an effective means for challenging state land alien statutes.[88] The equal protection clause states, "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."[89] Although federal and state courts have applied the equal protection privilege to resident aliens,[90] the courts have refrained from extending the same protection to nonresident aliens because they do not fall within the jurisdiction of the state.[91] Some scholars have argued that nonresident aliens are not "discrete and insular" minorities because, first, they have diplomatic support from their home government, and, second, their investment, rather than a means of survival, is a profit seeking venture.[92] Therefore, the federal and state courts apply

84. Comment, *Foreign Investment in Mississippi*, *supra* note 70, at 834 (noting that the effect of the due process clause on the nonresident alien depends upon whether the court assumes a "territorial view" or a "vested" due process view).

85. *Id.*

86. *Id.*

87. Fisch, *supra* note 82, at 420-21.

88. Morrison, *supra* note 4, at 639.

89. U.S. CONST. amend. XIV, § 1.

90. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1896) (holding that the fourteenth amendment protects all persons within the territorial jurisdiction of the state regardless of nationality).

91. *See* Shames v. Nebraska, 323 F. Supp. 1321, 1333 (D. Neb. 1971) (holding that a nonresident alien who is not physically present in a state is not subject to constitutional equal protection guarantees).

92. *See* Morrison, *supra* note 4, at 643. Professor Morrison argues that nonresident aliens do not deserve the higher classification that isolated minorities receive because they can expect the diplomatic support of their country, whereas legal permanent resident aliens cannot. *Id.* Professor Morrison believes that the lower standard is satisfied because the legislative classification of aliens is rationally related to the ostensibly immediate purpose of excluding alien influence from the state. *Id.* The higher strict scrutiny standard applies to resident aliens to defeat state restrictions on alien land ownership because their ownership of land is basic to economic survival, whereas the land ownership interests of nonresident aliens are deemed to be investments. *Id.* at 642.

the lower level rational relationship standard for nonresident aliens[93] to uphold the constitutionality of state laws but mandate the application of a higher level, strict scrutiny standard to resident aliens.[94]

In *Lehndorff Geneva, Inc. v. Warren*,[95] the Wisconsin Supreme Court utilized the lower standard of review to uphold a statute that prohibited nonresident aliens from owning more than 640 acres of land in Wisconsin.[96] The court agreed with the State that nonresident alien ownership poses potential harm to the well being of the community because people who are not residents or citizens of a state do not keep the best interests and welfare of the community in mind.[97] The court justified the exclusion of nonresident aliens from a strict scrutiny standard noting that nonresident aliens do not participate in United States politics, pay taxes, or serve in the armed forces.[98] Therefore, where courts apply the rational relationship standard, nonresident aliens holding investment interests that conflict with state laws will have difficulty overturning these laws as unconstitutional.

C. PREEMPTION

Although state governments have generally regulated the area of real property law, they have sometimes relinquished this control to the federal government under the preemption doctrine.[99] According to the United States Constitution, federal legislation can preempt or invalidate contrary state laws through the supremacy clause.[100] The landmark case of *Hines v. Davidowitz* defines the standard and the application of the preemption doctrine.[101] The Supreme Court in *Hines*

93. *See* Lehndorff Geneva, Inc. v. Warren, 74 Wis. 2d 369, 387-88, 256 N.W.2d 815, 825 (1976) (holding that the Wisconsin classification of nonresident aliens is sufficiently related to the state goal of limiting possibly detrimental absentee land ownership); *see also infra* notes 132-141 and accompanying text (discussing *Lehndorff* in detail).

94. *See* Graham v. Richardson, 403 U.S. 365, 371 (1971) (invalidating a discriminatory state law and holding that the strict scrutiny standard applies to resident aliens because the fourteenth amendment definition of persons includes citizens and lawfully admitted resident aliens, thus, they are entitled to the equal protection of the state in which they reside). The Supreme Court reaffirmed that classifications based on alienage, nationality, or race are inherently suspect and subject to close judicial scrutiny. *Id.* at 371-72.

95. Lehndorff Geneva, Inc. v. Warren, 74 Wis. 2d 369, 246 N.W.2d 815 (1976).

96. *See* 74 Wis. 2d at 373-374, 246 N.W.2d at 819 (finding that states possess the authority to restrict alien land ownership).

97. *Id.* at 74 Wis. 2d at 387-88, 246 N.W.2d at 825.

98. *Id.* at 74 Wis. 2d at 380, 246 N.W.2d at 821-22.

99. *See infra* notes 100-06 and accompanying text (discussing the preemption doctrine definition of the powers of the federal government over state government).

100. U.S. CONST. art. VI, § 2.

101. Hines v. Davidowitz, 312 U.S. 52 (1941) (preempting a Pennsylvania alien

held that federal legislation and treaties preempt contradictory state laws where the Constitution intended federal regulation to govern an area of law best suited for federal action[102] and where the affirmation of a state law would render a particular federal law ineffective.[103] For example, federal laws preempt the areas of naturalization[104] and foreign commerce.[105] Despite the potential for federal regulation preempting conflicting state laws, existing federal regulations regarding federal lands have not historically preempted state land laws because the federal laws address the restrictions placed on public land and resources.[106]

D. FOREIGN AFFAIRS ARGUMENTS

The exclusive power of the federal government to regulate commerce with foreign nations[107] allows implementation of the pro-foreign investment policy of the federal government. This power enables the regulation of state land statutes restricting rights of aliens to acquire and own real property.[108] Such state statutes could have a negative impact upon the relationship of the United States with the alien's home country.

The federal government's power to regulate commerce with foreign nations was established in *Zschernig v. Miller*.[109] The Supreme Court invalidated an Oregon statute[110] that restricted alien inheritance rights for certain foreigners. The Court reasoned that state regulations impinging on the free exercise of foreign policy must be invalidated.[111]

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registration law that conflicted with the Federal Alien Registration Act of 1940); *see also* Pennsylvania v. Nelson, 350 U.S. 497, 509 (1956) (holding that the federal Smith Act overrides and preempts a state sedition law).

102. Hines v. Davidowitz, 312 U.S. 52, 68 (1941).

103. *Id.* at 74.

104. U.S. CONST. art. I, § 8, cl. 4. Congress shall have the power "[t]o establish an uniform Rule of Naturalization . . . ." *Id.*; Graham v. Richardson, 403 U.S. 365, 380 (1971) (holding that the immigration powers of Congress preempt conflicting state laws that deny aliens the right to earn a living); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418-19 (1948) (finding that a California law denying aliens the right to earn a living conflicts with the constitutionally endowed power of Congress to regulate immigration).

105. U.S. CONST. art. I, § 8, cl. 3. Congress shall have the power "[t]o regulate Commerce with foreign nations . . . ." *Id.*

106. *See supra* notes 76-77 and accompanying text (discussing the application of federal alien land laws to public lands only).

107. U.S. CONST. art. I, § 8, cl. 3.

108. *See* Forst, *supra* note 49, at 37-38 (discussing the United States foreign affairs powers under the Constitution).

109. Zschernig v. Miller, 389 U.S. 429 (1968) (holding states have no power to regulate foreigner's inheritances).

110. ORE. REV. STAT. § 111.070 (1957).

111. *See* Forst, *supra* note 49, at 440. The Supreme Court believed that the provi-

Thus, under the *Zschernig* principle, a state law discriminating against certain countries while favoring others can be invalidated if state statutes and policies regarding foreign investment usurp the foreign affairs power of the federal government.[112]

E. TREATY POWER

Pursuant to the Constitution,[113] treaties have the power to invalidate state laws regulating alien ownership and acquisition of real property when such laws conflict with the terms or provisions of the treaty.[114] Pursuant to the "later-in-time" doctrine, treaties may also invalidate federal laws that conflict with the treaty if such laws were adopted prior to the enactment of the treaty.[115]

At present, two types of treaties exist that address United States real property issues: the bilateral FCN treaties,[116] and a multilateral agreement entitled the Code for the Liberalisation of Capital Movements (OECD Code), supervised by the Organization for Economic Coopera-

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sions of the Oregon statute involved the state in foreign affairs and international relations which, the Court stated, the Constitution had delegated solely to the federal government. *Id.* at 436. The concerns of the Supreme Court centered around the sections that provided for escheat where a nonresident alien claims personalty unless: (1) there is a reciprocal right of a United States citizen of a foreign nation; (2) American citizens have the right to receive payments here of funds from estates in the foreign country; and (3) foreign heirs have the right to receive Oregon estates proceeds without confiscation. *Id.* at 430-31.

112. Morrison, *supra* note 4, at 649; *see also*, Comment, *Foreign Investment in Mississippi*, *supra* note 63, at 842-43 (discussing the potential of the foreign affairs doctrine to apply to Mississippi's land statute). The Mississippi statute, which exempts Syrians and Lebanese from the nonresident alien ownership prohibition, demonstrates Mississippi's exercise of foreign policy, and therefore, may come under constitutional attack. *Id.* at 842.

113. U.S. CONST. art. VI, § 2.

114. *See* Hauenstein v. Lynham, 100 U.S. 483, 488-89 (1879) (preempting a state statute requiring escheat to the state of an intestate alien because it conflicted with a treaty); *cf.* Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (voiding a city ordinance that conflicted with a federal treaty); Missouri v. Holland, 252 U.S. 416, 432 (1920) (holding that the treaty between the United States and Great Britain providing for the protection of migratory birds in the United States and Canada supercedes state law and does not infringe property rights or sovereign powers that the tenth amendment reserves to the states).

115. Reid v. Covert, 354 U.S. 1, 18 (1957) (holding that when a subsequent treaty conflicts with an earlier federal law, the court will invalidate the federal law). Conversely, a new federal law will override a pre-existing treaty. *Id.*

116. *See* Walker, *supra* note 14, at 230 (stating that the goal of FCN treaties is to create a policy of hospitality and equality toward foreign investors); *see also* Gudgeon, *supra* note 14, at 108 (stating that approximately 50 FCN treaties exist between the United States and other countries). Half of these FCN treaties came into effect after World War II. *Id.* Modern provisions of the treaties guarantee commercial access, property protection, and standard of treatment. *Id.*

tion and Development.[117] Although both types of agreements generally aim to encourage and protect foreign direct investment,[118] neither clearly guarantee the rights of foreigners to acquire and to own land in the United States.[119] Rather, these agreements deal with the rights of foreign investors in narrow circumstances, such as the right to inheritance[120] or the right to acquire property necessary for the operation of a particular business.[121] Most of these treaties also grant each signatory nation the right to restrict mineral and agricultural resources.[122] Unlike

117. Organization for Economic Cooperation and Development, Code of Liberalisation of Capital Movements, Dec. 4, 1960, 12 U.S.T. 1728, T.I.A.S. No. 4891 [hereinafter OECD Code].

118. *See* Walker, *supra* note 14, at 230 (explaining that the fundamental idea behind the creation of FCN treaties is to assure that aliens and their properties will be accorded judicial protection equal to that of domestic citizens).

119. Brodkey, *The Effect of Bilateral Treaties on Foreign Investment in United States Real Estate*, 1985 PRAC. REAL. EST. LAW. 91, 93 (stating that FCN treaties do not give foreign investors an "unequivocal right" to own United States real estate).

120. *See, e.g.*, United States-Japan FCN Treaty, *supra* note 15, art. IX, para. 3.

> Nationals and companies of either Party shall be permitted freely to dispose of property within the territories of the other Party with respect to the acquisition of which through testate or intestate succession on their alienage has prevented them from receiving national treatment, and they shall be permitted a term of at least five years in which to effect such disposition.

Id.

121. *Id.* art. IX, para. 2.

> Nationals and companies of either Party shall be accorded within the territories of the other Party national treatment and most favored nation treatment with respect to acquiring, by purchase, lease, or otherwise, and with respect to owning and possessing, movable properties of all kinds, both tangible and intangible. However, either Party may impose restrictions on alien ownership of materials dangerous from the standpoint of public safety and alien ownership of interests in enterprises carrying on the activities listed in the first sentence of paragraph 2 of Article VII, but only to the extent that this can be done without impairing the rights and privileges secured by Article VII or by other provisions of the present Treaty.

Id.

122. *Id.* art. VII, para. 2.

> Each Party reserves the right to limit the extent to which aliens may within its territory establish, acquire interests in, or carry on public utilities enterprises or enterprises engaged in shipbuilding, air or water transport, banking involving depository or fiduciary functions, or the exploitation of land or other natural resources. However, new limitations imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to carrying on such activities within its territories, shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted and which are owned or controlled by nationals and companies of the other Party. Moreover, neither Party shall deny to transportation, communications and banking companies of the other Party the right to maintain branches and agencies to perform functions necessary for essentially international operations in which they are permitted to engage.

Id.

the informal OECD Code,[123] however, bilateral FCN treaties have a binding effect on state alien land laws.[124] Reciprocity is the basic premise of FCN treaties[125] which grant both "national treatment"[126] and "most favored nation" treatment.[127]

IV. THE INEFFECTIVENESS OF EXISTING FCN TREATIES OVER ALIEN LAND LAWS

A. STATE'S CONTROL OVER REAL PROPERTY LAW: LESSONS FROM *Lehndorff Geneva, Inc. v. Warren*

Historically, state control of real property law has generally included the power to regulate and limit alien acquisition and ownership of real estate.[128] Not surprisingly, therefore, modern FCN treaties implicitly accept state authority to restrict foreign ownership of United States land.[129] An analysis of the FCN treaty between the United States and West Germany,[130] whose real property provisions are virtually identical

123. *See* Morrison, *supra* note 4, at 657 (stating that multilateral agreements, such as the OECD Code, merely discuss general government principles rather than specify an alien's rights).

124. *See id.* (commenting that bilateral treaties possess precise stipulations regarding land ownership).

125. *See id.* at 659 (explaining that to claim damages resulting from a breach of a FCN treaty, an alien must prove: (1) the FCN treaty applies to him individually; (2) he is a citizen of the country in question; (3) the United States has ratified the FCN treaty; and (4) the United States has adopted the treaty as an internal law).

126. *See* United States-Japan FCN Treaty, *supra* note 15, art. XXII, para. 1 (defining national treatment as "treatment accorded within the territories of a Party upon terms no less favorable than treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party").

127. *Id.* art. XXII, para. 2 (defining MFN treatment as "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country").

128. *See supra* note 48-49 and accompanying text (discussing the legitimacy of anti-alien state statutes).

129. *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, art. IX, 8 U.S.T. 2043, T.I.A.S. No. 3942 [hereinafter United States-Netherlands FCN Treaty] (stating in relevant part that a foreign national is allowed to lease land and to have other permissible real property rights); *see also* Brodkey, *supra* note 119, at 93-94 (stating that the federal government implicitly accepts state control through FCN treaty provisions, such as the common provision that allows aliens to dispose of their property within a certain time period if local laws forbid the alien to hold property); *supra* note 119 and accompanying text (discussing the Japanese inheritance provision that permits a Japanese person to dispose of property within a five year period in cases where the ownership of property violates local land law).

130. Treaty of Friendship, Commerce and Navigation, July 14, 1956, United States-Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593 [hereinafter United States-West Germany FCN Treaty].

to the United States-Japan FCN Treaty,[131] illustrates the long held belief that state laws can define a foreign investor's right to real property.

Involving the FCN treaty between the United States and West Germany, the Supreme Court of Wisconsin, in *Lehndorff Geneva, Inc. v. Warren*,[132] upheld the validity of a Wisconsin statute prohibiting a nonresident alien, who owned more than twenty percent of corporate or association stock, from acquiring or owning more than 640 acres of Wisconsin land.[133] Lehndorff Geneva, Inc., as the general partner for Lehndorff Farms, Ltd., an Illinois limited partnership,[134] argued for the abolishment of the eighty-nine-year-old law, alleging that it contravened the United States pro-foreign investment policy.[135] Furthermore, Lehndorff Geneva argued that the Wisconsin statute denied the limited partnership the rights guaranteed under the West German FCN Treaty[136] and the equal protection clause of the United States Constitution.[137] The court, however, rejected Lehndorff's arguments, finding that the West German FCN Treaty did not enjoin a state from passing a law like the Wisconsin statute.[138] Most importantly, the court stated that the treaty did not give nonresident aliens the right to purchase and hold land contrary to existing state law.[139] The court, thereby accepted

131. United States-Japan FCN Treaty, *supra* note 15.

132. Lehndorff Geneva, Inc., 74 Wis. 2d at 376, 246 N.W.2d at 818-19.

133. *See id.* (reproducing the relevant real property provisions of the United States-West Germany FCN Treaty). The provision of the United States-Japan FCN Treaty are identical to the United States-West Germany FCN Treaty provisions discussed in *Lehndorff Geneva. Id.*

134. *Id.* 74 Wis. 2d at 371, 246 N.W.2d at 817 (explaining that Lehndorff Farms, Ltd.'s general partner, Lehndorff Geneva, Inc., may attack the constitutionality of the Wisconsin statute because Lehndorff Farms, Ltd. bears the risk of forfeiture under the statute). Thus, the Supreme Court of Wisconsin stated that its decision with respect to Lehendorff Farms, Ltd. "would apply equally" to Lehndorff Geneva, Inc. *Id.*

135. *See id.* (stating that economic conditions render the restriction anachronistic); *see also supra* note 3 and accompanying text (discussing the United States pro-foreign investment policy).

136. *Id.*

137. *See id.* 74 Wis. 2d at 374, 246 N.W.2d at 820 (arguing that the state has to present a compelling justification for alien classifications under a strict scrutiny standard because alien classifications are "inherently suspect"); *see also supra* notes 92-93 and accompanying text (noting that the rational relationship standard is used because aliens do not participate in the total mix of American institutions to justify strict scrutiny).

138. *See Lehndorff Geneva, Inc.*, 74 Wis. 2d at 376, 246 N.W.2d at 818-19 (interpreting the limits on the "exploitation of land" of article VII, paragraph 2, of the United States-West German FCN Treaty as permitting the United States to restrict alien exploitation of land and natural resources, and "by implication", alien ownership of land); *see also supra* note 122 and accompanying text (quoting article VII, paragraph 2 of the United States-Japan FCN Treaty, an article similar to the United States-West Germany FCN Treaty in its restriction of alien land ownership).

139. *Lehndorff Geneva, Inc.*, 74 Wis. 2d at 388, 246 N.W.2d at 825.

state limitations on the rights of foreign investors to acquire or own land in the United States. Finally, the court rejected the application of a strict scrutiny standard to nonresident aliens in an area, such as property law, generally under state control.[140] Thus, the court held that the Wisconsin statute did not violate the equal protection clause.[141] Although such laws have not yet affected Japanese investors, the *Lehndorff Geneva* decision suggests that a Japanese lawsuit based upon the existing Japanese FCN Treaty would ultimately fail.

B. THE EXISTING UNITED STATES-JAPAN FCN TREATY

Several provisions of the United States-Japan FCN Treaty regarding the acquisition and ownership of real property, which are virtually identical to the provisions of the West German FCN Treaty at issue in *Lehndorff Geneva, Inc. v. Warren*, also lack enforcement value because of Congress' deference to state law in real property matters.[142] Under the existing United States-Japan FCN Treaty's article VII and article IX,[143] the two pertinent provisions dealing with real property matters, a state is not prohibited from enforcing restrictive anti-alien land statutes and will therefore withstand a Japanese citizen's constitutional attack under article VI of the United States Constitution.[144] In fact, there are no provisions in the United States-Japan FCN Treaty that give nonresident Japanese citizens the right to purchase and hold land in contravention with existing state land law.[145]

Article VII, paragraph 2 of the Japanese FCN Treaty best exemplifies the deference accorded state law in property law matters. This provision allows the United States "the right to limit the extent to which aliens may within its territories establish, acquire interests in, or carry

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140. *Id.*; *see also supra* notes 48-49 and accompanying text (discussing state control of property law).

141. *Id.* 74 Wis. 2d at 389, 246 N.W.2d at 825; *see also supra* note 92-93 and accompanying text (explaining the rationale for applying a lower standard of review to nonresident aliens).

142. *See Commercial Treaties: Hearing Before the Subcomm. of the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. 4 (1953) [hereinafter Senate Hearings] (revealing the reluctance of the federal government to interfere with matters, such as property law, that are generally under state control); *see also* Morrison, *supra* note 4, at 629 (stating that the states, with two exceptions, determine the laws of real estate ownership).

143. *See supra* notes 120-22 (quoting the provisions of the United States-Japan FCN Treaty that discuss the acquisition and ownership of real property).

144. *See* U.S. CONST. art. VI (stating the supremacy clause).

145. *Cf. Lehndorff Geneva, Inc.*, 74 Wis. 2d at 376, 246 N.W.2d at 819 (finding that the United States-West Germany FCN Treaty, whose property law provisions resemble the United States-Japan FCN Treaty, does not grant nonresident West German citizens the right to purchase and hold land contrary to existing state land law).

on . . . enterprises engaged in . . . the exploitation of land or other natural resources."[146] The right of the United States to limit the "exploitation of land" has been interpreted as allowing for the imposition of state land restrictions on nonresident aliens.[147] The court in *Lehndorff Geneva*, for example, interpreted the word "exploit" as "to turn a natural source to economic account."[148] Under this definition, states can interpret the treaty's "exploitation of land" reservation not only as a prohibition from engaging in agriculture and mineral resource development, but also from indulging in real estate speculation.[149] Thus, in the event of a constitutional attack on a restrictive land statute, the United States courts will probably uphold a state statute designed to limit land exploitation by nonresident aliens as falling under the grant of authority conferred by article VII, paragraph 2 of the United States-Japan FCN Treaty.

The only other provision of the United States-Japan FCN Treaty that addresses real property matters is article IX that provides for national treatment with respect to the nonresident alien's right to acquire land necessary for operation of permitted businesses.[150] This right, however, only permits the Japanese nonresident alien to lease, but not purchase or own real estate. This provision specifically allows for "national treatment with respect to leasing land [and] buildings . . . appropriate to the conduct of activities in which they are permitted to engage pursuant to article VII and VIII and for residential purposes, and with respect to occupying and using such property."[151] At least one scholar has denounced the national treatment rule for its inadequacy "in the matters of real property tenure . . . because of inhibitions laid on treaty-making by certain State laws."[152]

Article IX, paragraph 3 and 4, also implicitly recognize the authority of anti-alien land statutes by guaranteeing a nonresident Japanese citizen the right to dispose of inherited property in five years in states

146. United States-Japan FCN Treaty, *supra* note 15, art. VII, para. 2.

147. Morrison, *supra* note 4, at 660; *cf. Lehndorff Geneva, Inc.*, 74 Wis. 2d at 376, 246 N.W.2d at 819 (interpreting the United States right to limit alien exploitation of land, by implication to include the restriction of alien ownership of land).

148. *Lehndorff Geneva, Inc.*, 74 Wis. 2d at 376, 246 N.W.2d at 819 (defining the word "exploit" in the context of article VII, paragraph 2 of the United States-West Germany FCN Treaty, a provision which mirrors the United States-Japan FCN Treaty).

149. Morrison, *supra* note 4, at 660.

150. United States-Japan FCN Treaty, *supra* note 15, art. IX, para. 1.

151. *Id.* art. IX, para. 1(a).

152. *See* Walker, *supra* note 14, at 237 (citing the United States-Netherlands FCN Treaty as a means of illuminating the inadequacy and infeasibility of a national treatment rule).

where their alien status precludes them from receiving national treatment.[153] This allowance provision, however, not only recognizes the authority of state restrictions on alien ownership, but it also eases the effect of anti-alien inheritance laws applicable to the Japanese nonresident alien.[154] Federal acquiescence, evidenced by the repeated renegotiations and ratifications of similar treaties, also demonstrates the recognition of anti-alien statutes.[155]

Finally, the above analysis shows that articles VII and IX of the United States-Japan FCN Treaty that address real property matters do recognize the states' authority to restrict land ownership by aliens. Therefore, as long as state law restrictions on nonresident alien ownership of land bear a rational relationship to a legitimate state purpose, such as excluding potentially dangerous alien influence from the state, such state statutes will withstand constitutional attack.[156]

C. Reasons for Enforcing a FCN Treaty

While the *Lehndorff Geneva, Inc. v. Warren* decision stated reasons for not allowing a FCN treaty to preempt state law, several reasons exist for enforcing a FCN treaty. First, if FCN treaties reflect the United States proforeign investment policy, enforcement is necessary to invalidate state alien land laws that are inconsistent with United States foreign policy objectives.[157] Second, the enforcement of effective real property provisions of FCN treaties disposes with the confusion and uncertainty foreign investors confront.[158] Third, most of the restrictive state laws are the result of domestic fears of foreign investment[159] and without an effective treaty, these statutes could induce retaliation against important United States interests abroad.

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153. United States-Japan FCN Treaty, *supra* note 15, art. IX, para. 3.

154. Morrison, *supra* note 4, at 660.

155. *Id.*

156. *See supra* notes 80-98 and accompanying text (presenting the due process and equal protection considerations in the area of foreign investment in the United States); Morrison, *supra* note 4, at 642-45 (claiming that equal protection and substantive due process work together in addressing the legitimacy of the purpose of classification).

157. *See* Missouri v. Holland, 252 U.S. 416, 434 (1920) (holding that valid treaties are binding on states). *But see* Senate Hearings, *supra* note 147, at 4 (stating that the United States-Japan FCN Treaty is not designed to "encroach or enlarge" the authority or power of the states or the federal government in areas that have generally been reserved to the state under the Constitution).

158. *See supra* notes 4-5 and accompanying text (discussing the confusion and disincentive that the vast array of state laws present).

159. *See* Note, *Xenophobic or Principles Reaction*, *supra* note 6, at 502 (discussing the effect of xenophobic sentiments on restrictive state alien land law).

V. RECOMMENDATIONS FOR THE JAPANESE FCN TREATY

A. ALLOWING THE JAPANESE FCN TREATY PROVISIONS TO PREEMPT CONTRADICTORY STATE LAWS THROUGH NATIONAL TREATMENT STATUS

Ever since the enactment of the first bilateral FCN treaty, the United States has hesitated to remove the control of alien land laws from the states.[160] Not surprisingly, during the hearing regarding the adoption of the Japanese FCN Treaty,[161] the Senators who discussed federal-state relations came to the conclusion that the federal government did not intend to transgress traditional state authority.[162] Because real property law usually falls under the control of the states, the Senators refrained from enforcing a national treatment standard on the treaty provisions regarding the Japanese acquisition and ownership of real property.[163] If the United States government enforced the national treatment provisions relating to the acquisition and ownership of the Japanese FCN Treaty, the United States would restrict Japanese investors only to the extent that it restricts American investors. Therefore, declaring state statutes, such as the Mississippi statute[164] unconstitutional, presents the only feasible alternative. These statutes contradict the national treatment provisions regarding Japanese investment in real estate in the United States and usurp the treaty and foreign affairs powers of the federal government.

By allowing the states to restrict Japanese real property rights, the United States is negating the general goals of the treaty. Promoting foreign investment in the United States, facilitating American private-

160. *See* Senate Hearings, *supra* note 142, at 4 (revealing the reluctance of the federal government to interfere with matters, such as property law, that are generally under state control). The conversation regarding federal-state relations between Senator Hickenlooper and Mr. Setser, the Chief of the Economic Treaties Branch of the State Department, demonstrates the volatility of the political confrontation between state and federal authorities. *Id.*

161. *See id.* at 4-5 (discussing possible changes and legal issues relating to the United States-Japan FCN Treaty and other treaties before ratification).

162. *Id.* at 4 (questioning whether any executive branch agency intends to enlarge federal authority in customary state domains or diminish state power in these same areas).

163. *See id.* (finding that the treaty provisions did not enlarge federal powers over state domain). *But see*, Missouri v. Holland, 252, U.S. 416, 432 (1920) (stating that treaties supercede state laws, even in areas that the federal government has traditionally left to the states).

164. MISS. CODE ANN. § 89-1-23 (1974 & Supp. 1988) (permitting only Syrian and Lebanese nonresident aliens to inherit Mississippi land).

sector investment in foreign countries,[165] and guaranteeing the security of American property rights abroad[166] are the three primary objectives that states are challenging. In order to implement the national treatment standard, the courts should abandon the *Lehndorff* standard[167] and find that any state land restrictions on nonresident aliens are violative of the equal protection clause of the fourteenth amendment.

Once the national treatment standard is enforced, the Japanese FCN Treaty can legally preempt laws inconsistent with its provisions.[168] Furthermore, FCN treaties, including the United States-Japan FCN Treaty, are self-executing.[169] Such treaties are domestic laws of their own accord and do not need implementing legislation to render them effective.[170] The national treatment status will have the beneficial effect of dispelling any uncertainty, confusion, or disincentive associated with inconsistent and xenophobic state laws.

B. Application of the MFN Clause: An Alternative to the National Treatment Recommendation

Perhaps a less radical and more politically acceptable proposal is to enforce MFN treatment for the provisions of the treaty. Presently, the treaties allow states to restrict land exploitation,[171] which at least one scholar has found to include real estate speculation.[172] By granting MFN treatment, the United States can assure Japanese investors that

165. *See* Senate Hearings, *supra* note 142, at 2 (explaining that the object of State Department negotiations is to expedite the safety of American citizens and interests overseas). These treaties aim to assure just compensation where the government nationalizes property and a reasonable opportunity to repatriate income and capital. *Id.* at 3.

166. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1263, 1267 (E.D. Pa. 1980) (holding that the aim of the United States-Japan FCN Treaty is to assure the protection of American citizens and their interests abroad).

167. *See supra* notes 128-141 and accompanying text (discussing the *Lehndorff Geneva, Inc.* case in detail and stating that nonresident aliens deserve a minimal rationality standard as opposed to the strict scrutiny standard applied to resident aliens).

168. *See* L. Henkin, Foreign Affairs and the Constitution 244 (1972) (stating that the Supreme Court has imputed preemption only to acts of Congress, yet no reason exists why a treaty could not additionally be construed as narrowing the field to state regulation); Oregon-Pacific Forest Products Corp. v. Welsh Panel Co., 248 F. Supp. 903, 910 (D. Or. 1965) (stating that the United States-Japan FCN Treaty is the supreme law of the land).

169. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1263, 1266 (E.D. Pa. 1980).

170. *See id.* (concluding that the legal effect of a self-executing treaty is equal to that of a legislative act).

171. United States-Japan FCN Treaty, *supra* note 15, art. VII, para. 2.

172. *Id.*; *see* Morrison, *supra* note 4, at 660 (stating that, in its present form, FCN treaties, such as the United States-Japan FCN treaty, give the United States the right to limit the exploitation of land which may include the right to prohibit real estate speculation and development).

any restrictions imposed on their ability to invest in and own land are no more onerous than those imposed on the citizens of the country with which the United States has the most liberal treaty. For example, the Mayor of Honolulu's threat to limit foreign investors' real estate speculation[173] would affect Japanese investors only to the extent that the law would affect other foreign investors whose countries have the most liberal treaties with the United States.

CONCLUSION

In recent years, Japanese investment in United States real estate has increased, despite the wide array of conflicting and confusing state laws. Although restrictive state laws have not discouraged Japanese investors from investing in the real estate market, they have the potential to limit investment in states that do not seek Japanese industry in order to boost their industrial economy. To effectuate a sound pro-foreign investment policy, the federal government should modify and enforce the United States-Japan FCN Treaty to clearly guarantee the property rights of Japanese investors against state laws that ignore or contravene United States foreign policy in this area. The implementation of new treaty provisions, however, will depend upon the willingness of federal institutions to preempt a field of law that has traditionally been left to the control of the states.

173. *See supra* notes 38-40 and accompanying text (discussing reasons for a proposal in the Hawaii state legislature to limit foreign investment in local real estate).